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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

August 20, 1993

*MASSACHUSETTS BAR ONLY

VIA HAND DELIVERY

Bruce Romano, Esq.
Federal Communications Commission
2025 M Street, N.W.
Room 8010
Washington, DC 20554

Re: Implementation of the 1992 Cable Act
Rate Regulation, MM Docket No. 92-266
Negative Option Billing

Dear Bruce:

We are writing to bring to your attention a matter which we believe warrants the Commission's expeditious consideration.

As you know, cable operators throughout the country are currently engaged in restructuring rates and retiering services in response to the Commission's rate regulation order. The Commission has acknowledged on several occasions that such restructuring is appropriate. Indeed, in order to facilitate the implementation of the changes prior to the September 1, 1993 rate regulation effective date, the Commission has preempted state and local notice requirements that would have impeded such restructuring.

It has recently come to our attention that some state and local authorities are threatening to restrict a cable operator's ability to retier by citing laws that go beyond the constraints imposed by the Commission's negative option billing rule. For example, while the Commission has made clear that "restructuring of tiers and equipment, including

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restructuring appropriate for implementing the Cable Act's provisions, will not bring the negative option provision into play if subscribers will continue to receive the same number of channels and the same equipment,"¹ it is being argued that such restructuring is, as a matter of state or local law, a deceptive practice or negative option.

We strongly urge that the Commission clarify that state and local officials may not block cable operators from engaging in business practices that are legitimate under the Commission's rules. In support of this request we note that Congress has clearly expressed its intent for the provisions of the 1992 Cable Act and the Commission's implementing regulations to fully occupy the field of cable television rate regulation.² Further, the Commission itself has previously addressed the question of preemption of state negative option laws in its Report and Order implementing the Commission's rate regulations:

Some municipalities argue that state and local governments should have concurrent enforcement powers over negative option billing practices. Austin Comments at 71-72. We do not preclude state and local authorities from adopting rules or taking enforcement action relating to basic services or associated equipment consistent with the implementing rules we adopt and their powers under state law to impose penalties. Report and Order at n. 1095 (emphasis added).

¹In the Matter of Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992, Rate Regulation, MM Docket No. 92-266 at ¶ 441 and n.1105 ("Report and Order").

Under the Commission's interpretation of the "negative option" provision, a cable operator offering twenty channels for twenty dollars may restructure its service to provide one tier of sixteen channels for sixteen dollars and a second tier of four channels for 4 dollars without the affirmative consent of its subscribers. Similarly, the operator could restructure the service to offer sixteen channels for sixteen dollars and four channels for one dollar apiece (or all four for four dollars or less).

²47 U.S.C. § 543(a)(1): "No Federal agency or State may regulate the rates for the provision of cable service except to the extent provided under this section." The negative option provision is contained in subsection (f) of this section.

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Given that the 1992 Cable Act has clearly preempted all other state rate regulation, it is evident from the Commission's statement that state laws which are not consistent with the Commission's rules are preempted.³ Preemption of inconsistent state law is supported by the Supreme Court's decision in the City of New York v. FCC,⁴ which upheld that the Commission's decision to preempt as "inconsistent" with federal policy local technical standards that were more stringent than the Commission's rules.⁵

Finally, as stated in the Report and Order, while allegations of negative option violations may raise some issues resolvable in state courts, questions relating to the interpretation of the Commission's rules "would be more easily and appropriately resolved by the Commission as an expert agency."⁶ Inconsistent state laws would undermine such agency expertise. Furthermore, as we noted above, the Commission has already preempted local notice provisions regarding rate changes in order to further the implementation schedule of the Commission's rate regulations.⁷

³As noted above, regulation of negative options is encompassed within the Commission's rate regulation jurisdiction. State and local officials may not attempt to circumvent the limits on their authority over rates by characterizing their efforts as consumer protection or customer service regulation.

⁴486 U.S. 57 (1988).

⁵In the negative option context, state and local policies that prohibit certain business practices are plainly inconsistent with federal policies expressly permitting the same practices.


⁶Report and Order at ¶ 439.

⁷See Order, FCC 93-264, MM Docket No. 92-266 at ¶ 3 (released May 14, 1993).

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For these reasons, we ask that the Commission clarify and reiterate that more stringent state and local laws addressing "negative option" billing practices are not consistent with the Commission's rules and are preempted.

Sincerely,



Charles S. Walsh

cc: W. Caton, Acting Secretary
S. Wilson
B. Johnson
B. Corn-Revere
J. Hollar
J. Coltharp